

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

A.O.A., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) No. 4:11-CV-44-CDP  
 )  
 DOE RUN RESOURCES CORPORATION, et al., )  
 )  
 Defendants. )

TELEPHONIC STATUS CONFERENCE

BEFORE THE HONORABLE CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE

JULY 28, 2020

**APPEARANCES:**

For Plaintiffs

Elizabeth Wilkins Flieger, Esq.  
Jerome J. Schlichter, Esq.  
Kristine K. Kraft, Esq.  
Nelson G. Wolff, Esq.  
**SCHLICHTER BOGARD & DENTON, LLP**

For Defendants

Doe Run Resources  
Corporation,  
Marvin K. Kaiser,  
Albert Bruce Neil,  
Jeffrey L. Zelms,  
Theodore P. Fox III

Thomas P. Berra Jr., Esq.  
**LEWIS RICE LLC**

**(APPEARANCES CONTINUED ON PAGE 2)**

REPORTED BY:

Gayle D. Madden, CSR, RDR, CRR  
Official Court Reporter  
United States District Court  
111 South Tenth Street, Third Floor  
St. Louis, MO 63102 (314) 244-7987

(Produced by computer-aided mechanical stenography.)

**APPEARANCES CONTINUED:**

For Defendants Jeffrey R. Hoops, Esq.  
D.R. Acquisition Corp., **DOWD BENNETT LLP**  
The Renco Group, Inc.,  
Ira L. Rennert,  
Doe Run Cayman Holdings  
LLC

For Defendants Andrew T. Bayman, Esq.  
Doe Run Resources Geoffrey M. Drake, Esq.  
Corporation, Tracie J. Renfroe, Esq.  
Marvin K. Kaiser, **KING & SPALDING LLP**  
Albert Bruce Neil,  
Jeffrey L. Zelms,  
Theodore P. Fox III,  
D.R. Acquisition Corp.,  
The Renco Group, Inc.,  
Ira L. Rennert,  
Doe Run Cayman Holdings LLC

1 (Proceedings commenced at 10:05 a.m.)

2 THE COURT: Good morning. This is Judge Perry, and  
3 we are here on the Doe Run case, 4:11-CV-44, for a telephone  
4 status conference, and so I would ask if I can hear from the  
5 Plaintiffs' lawyers; which -- tell me who is here on behalf of  
6 the Plaintiffs.

7 MR. SCHLICHTER: Jerry Schlichter.

8 MR. WOLFF: Nelson Wolff, Kris Kraft, and Beth  
9 Wilkins.

10 THE COURT: Okay. And who is here on behalf of the  
11 Defendants? Do you want to start with the Renco Defendants?

12 MS. RENFROE: Good morning, Your Honor. This is  
13 Tracie Renfroe of King & Spalding for all of the Defendants.

14 THE COURT: Okay.

15 MR. BAYMAN: Good morning, Your Honor. Andrew  
16 Bayman, King & Spalding, on behalf of all of the Defendants.

17 MR. DRAKE: And good morning, Your Honor. Geoffrey  
18 Drake, also from King & Spalding, for all the Defendants.

19 MR. HOOPS: Good morning. This is Jeff Hoops, from  
20 Dowd Bennett, on behalf of the Renco Defendants.

21 THE COURT: Okay. Others --

22 MR. BERRA: And this is --

23 THE COURT: -- on for Defendants? Go ahead.

24 MR. BERRA: Yes, Your Honor. Thank you. This is Tom  
25 Berra, from Lewis Rice, for Doe Run Resources Corporation and

1 the Doe Run Resources individual Defendants.

2 THE COURT: Okay. Anybody else on the line for the  
3 Defendants?

4 Okay. So thank you for sending in the -- the things  
5 to discuss, and I'll start with the list you all had provided  
6 and then talk about other things. What's the issue with the  
7 status of the depositions of Plaintiffs' rebuttal experts?

8 MR. DRAKE: Good morning, Your Honor. This is  
9 Geoffrey Drake for the Defendants. Fortunately, I'm pleased  
10 to report there are no issues. We just wanted to let Your  
11 Honor know that all is progressing smoothly in that regard.  
12 The Defendants have completed three of the seven depositions  
13 we intend to take of the Plaintiffs' rebuttal experts. The  
14 remaining four are scheduled over the next coming weeks.

15 THE COURT: Great. So that's good to know. All  
16 right. Thank you.

17 And then additional fact depositions -- what's that  
18 issue?

19 MR. BERRA: Your Honor, this is Tom Berra. We have  
20 discussed with Ms. Kraft and Ms. Wilkins, in a preliminary  
21 call, the fact that we have additional fact witnesses that the  
22 defense is contemplating whether to take, and there's a bit of  
23 a history there, Your Honor. We had, obviously, served  
24 discovery requests on the Plaintiffs years ago requesting  
25 identification of witnesses that would be testifying at trial,

1 the witnesses upon whom the Plaintiffs were relying. You may  
2 recall also that we had not received Rule 26 disclosures in  
3 the traditional sense from the Plaintiffs. So  
4 fast-forwarding, as a defense group, we had been asking the  
5 Plaintiffs to provide us with answers to that discovery and to  
6 serve the Rule 26 disclosures, including the witness list  
7 that's required under the rule, for quite some time. The  
8 Plaintiffs agreed to do that and had eventually committed to  
9 getting that list to us on July 3rd. That deadline then  
10 passed. They had asked for extension to July 10th, which we  
11 agreed to, and then, ultimately, that date also passed, and we  
12 finally received the discovery responses and the first Rule 26  
13 listing of witnesses on the 17th of July.

14 We reviewed that and determined that there were  
15 somewhere between 10 and 15 witnesses that were disclosed on  
16 that list that for the first time, from our perspective, it  
17 appeared that the Plaintiffs might be relying on these folks  
18 at the trial of the case. So we brought up the fact that we  
19 were still analyzing those folks. And these are third-party  
20 witnesses, Your Honor. These are not defense company  
21 employees or Plaintiff family members. These were third-party  
22 individuals from a variety of different sources. We indicated  
23 that in reviewing that we were contemplating what we needed to  
24 do about them, and we asked, in a precall, if the Plaintiffs'  
25 group would agree to a 60-day extension of the pending

1 deadlines beginning with the August 24 discovery cutoff and  
2 then moving seriatim through the coming briefing schedule,  
3 give everyone an opportunity to sort through that list and, as  
4 necessary, tee up depositions -- these folks are not in  
5 St. Louis -- to get those things accomplished. Plaintiffs'  
6 counsel has declined our request for that brief extension.

7           Obviously, Your Honor, our position on that is quite  
8 simply that, you know, the case, obviously, has been pending  
9 for quite some time, but we have never seen this list before.  
10 We have never seen an identification of these people until,  
11 literally, 11 days ago, and from our perspective, it seemed  
12 more than reasonable to simply work together in an orderly  
13 fashion to get that accomplished.

14           We also have certain witnesses that are teed up for  
15 deposition already before the discover cutoff, and it appears  
16 that most of the days between now and then where all of the  
17 counsel are available are essentially spoken for with  
18 depositions of experts and some of these additional  
19 third-party witnesses. So because of that, again, Your Honor,  
20 we simply made that request.

21           We also have some other issues with the disclosure  
22 that we may need to discuss with Your Honor, but I'm going to  
23 hold on that for now, and I think that tees up the issue that  
24 we were wanting to address in paragraph two there.

25           THE COURT: Okay. Let me ask you this, Mr. Berra.

1 Who are these people, and where are they located? I mean just  
2 generally. They're not -- are any of them in Peru, or are  
3 they here?

4 MR. BERRA: The witnesses that were disclosed by the  
5 Plaintiffs, Your Honor, are not in Peru. They are throughout  
6 the United States. They include a variety of third parties,  
7 including some of the what I would call NGOs that were  
8 involved in different matters down in Peru over the years.  
9 There is one local person, a woman named Leslie Warden.  
10 Angela Hobson at Washington University is local as well, but  
11 there are a variety of people. One is in Pittsburgh. They  
12 did identify the Cardinal of Peru, Cardinal Barreto, who is  
13 based in Peru. It's unclear to us whether or not, of course,  
14 they actually intend to have the Cardinal testify. We don't  
15 know, but again, we are just beginning the process of sorting  
16 through this list, and we'll need to sit down with the  
17 Plaintiffs, frankly, and understand where these are going and  
18 try to determine if and how and when we'll be able to tee  
19 these folks up for deposition.

20 Some of these appear to be potentially pretty  
21 important witnesses. It was never clear to us, obviously,  
22 again, until 11 days ago that the Plaintiffs were intending to  
23 list them as potential trial witnesses. So we're trying to  
24 sort through that. We're not suggesting, Your Honor, that  
25 every one of these people is going to be deposed. We're not

1 sure yet, but it may be as many as 10 to 15, and as we said,  
2 we're not asking for, you know, let's just put everything on  
3 hold. We're simply asking for two months to sort through all  
4 of this, complete discovery, and essentially be in a position  
5 to box up for Your Honor the completed record for the various  
6 motions that are going to be filed. We've, obviously, been  
7 working for a very long time to get all of that ready, and  
8 what we don't want to do is engage in some sort of a piecemeal  
9 presentation for Your Honor. I don't think that's the right  
10 thing to do for you, and it could really complicate the  
11 process of getting through these motions.

12 THE COURT: Okay. I'll hear from the Plaintiffs on  
13 this.

14 MR. WOLFF: Good morning, Your Honor. This is Nelson  
15 Wolff. Mr. Berra made reference to 10 or 15 individuals that  
16 he claims that the Plaintiff identified for the first time in  
17 the Rule 26(a) disclosure that was issued 11 days ago, but in  
18 fact, I believe what he is pointing to is only six witnesses  
19 who are not the Plaintiffs or their next friends or  
20 Defendants' witnesses or the Plaintiffs' experts. Those six  
21 witnesses that are at issue -- and Your Honor correctly  
22 identified that some of these witnesses are in the St. Louis  
23 area. In fact, four of them are identified as being in the  
24 St. Louis area. Two of them are missionaries. One is the  
25 Archbishop, not the Cardinal, I don't think. I think it's



1 just the office of the Cardinal. And the other individual is  
2 somebody with the St. Louis University School of Public Health  
3 who authored a study that has been well-known to Defendants  
4 since the beginning of this case. The study was published in  
5 2005.

6 So we also have asked Defendants who among these six  
7 individuals, many of whom have been identified for a long  
8 time, they actually want to depose, and they have not  
9 identified any of them that they want to depose despite 11  
10 days passing. So I don't think that this issue is ripe for  
11 Your Honor's consideration. I think in fact the issue of the  
12 fact witness depositions that were identified at Defendants'  
13 request on the status report has to do more with the six  
14 witnesses that they have identified, including at least one,  
15 maybe more, that were identified for the very first time in  
16 their 26(a) disclosures that were supplemented right around  
17 the same time that we did, and two of those were issued notice  
18 of deposition just today or yesterday. We're still reviewing  
19 those, but we believe it's premature at this point in time to  
20 talk about extending for two months the discovery deadline  
21 with Defendants also requesting additional delays in the  
22 briefing scheduling for *Daubert* and motions for summary  
23 judgment, which they didn't mention to you but which they  
24 raised with us in the meet-and-confer conference yesterday.

25 THE COURT: Okay. Well, yeah, this is obviously a

1 problem.

2 MR. BERRA: If I may, Your Honor, just briefly  
3 respond.

4 THE COURT: Yeah. Go ahead.

5 MR. BERRA: There are at least seven people. There  
6 was another individual that Mr. Wolff left off the list.  
7 There were seven people not included in the list, but, again,  
8 there are some other individuals in that group that we're  
9 contemplating about depositions, but our need for depositions  
10 of some Peruvians is not factoring into that. We did discuss  
11 with them the fact that we have additional witnesses to depose  
12 who are not in this country and who have been challenging to  
13 communicate with and certainly challenging to get available  
14 for deposition because of the COVID situation in Peru, which  
15 is very dramatic and has been impacting a variety of things.  
16 There's been a national emergency in Peru for many months down  
17 there, but that is not the issue that was brought up. The  
18 issue that we're talking about entirely relates to this group  
19 of witnesses.

20 In addition to that, Your Honor, the Plaintiffs  
21 have -- have purported to identify virtually the entire  
22 community of La Oroya as potential witnesses. There are  
23 dramatic catchall identifications of witnesses in that group,  
24 and we're sorting through that and asked the Plaintiffs'  
25 lawyers specifically to tell us which other witnesses they

1 were talking about so that we could determine whether or not  
2 there was an additional group in there.

3 But our witnesses, the Peruvian witnesses that  
4 Mr. Wolff is referring to, we do have some already scheduled,  
5 and we are working to get the balance of them scheduled prior  
6 to the completion of the deadline. We did discuss with  
7 Plaintiffs' counsel that dealing with all of these in an  
8 orderly fashion might be to everyone's benefit, but we have  
9 been working and committed to attempting to get those all  
10 completed, in fact, by the deadline. So that is not the issue  
11 that's driving the discussion today.

12 And, Your Honor, one other last point is the  
13 witnesses that we're talking about that Mr. Wolff is  
14 suggesting there are only six -- in fact, seven in the Rule 26  
15 disclosures -- there are additional witnesses that are  
16 included in the discovery responses that we just received on  
17 the 17th. So we, essentially, received three different sets  
18 of responses. So the additional individuals that I'm talking  
19 about -- some of those are included in those responses. There  
20 is a variety of different witness lists that we received from  
21 the Plaintiffs that we're in the process of examining. So I  
22 just wanted to make that point as well.

23 THE COURT: Okay. Well, you all are going to have to  
24 meet and confer on this some more before I try to resolve it  
25 and whether there should be an extension. So what about I

1 talk to you all at -- I don't know -- next week on this issue  
2 and give you all time to talk about it and actually identify  
3 what it is exactly that everybody thinks they still need to  
4 do, and so I don't want to interfere with your deposition  
5 schedule, but what about next week sometime? We could do  
6 Thursday or I -- you know, I'm fairly open next week actually.  
7 What -- you know, what about having any telephone --

8 MR. BERRA: I think Wednesday would be better for us,  
9 and Mr. Drake can chime in on that, but I think that would be  
10 the better day for us, Your Honor, if it works for you.

11 MR. DRAKE: We do have -- this is Geoffrey Drake,  
12 Your Honor. We do have expert depositions on Wednesday and  
13 Thursday in these matters.

14 MR. BERRA: Yeah.

15 THE COURT: Would you be ready to talk to me on  
16 Tuesday?

17 MR. DRAKE: I think if that date works for -- I'll  
18 let Mr. Berra speak to his schedule, if he has --

19 MR. BERRA: Yes.

20 MR. DRAKE: -- on this particular issue, Your Honor.

21 MR. BERRA: Yes, we can do it then.

22 THE COURT: Okay. So Tuesday, you can do it? Is  
23 that -- I can't -- I'm not quite sure I got what you said.

24 MR. DRAKE: Yes, Your Honor.

25 THE COURT: Okay. Let's do Tuesday at noon. So

1 Tuesday, August the 4th, at 12:00 noon for a telephone hearing  
2 conference. It will be on the record, just as these are, and  
3 what I'd like you to do is meet and confer, and if there's  
4 anything you can send me, I guess I would say after you've met  
5 and conferred, see if you have any joint agreements, and if  
6 you do, file them by 5:00 on -- on -- file some kind of a  
7 status report by 5:00 on Monday, telling me, you know, what  
8 we're going to be talking about, what you've resolved, and  
9 what you're still arguing about, and -- and you'll have to --  
10 you know, you need to be much more precise than you are now.

11 MR. BERRA: Okay.

12 THE COURT: And tell me what the problems are and  
13 then tell me each side's proposed solution and -- because the  
14 discovery cutoff deadline is coming right up. So if we're  
15 going to change anything, we need to figure it out quickly,  
16 but -- so I'll talk to you all, set the next hearing for  
17 Tuesday, August the 4th, at 12:00 noon.

18 MR. BERRA: Thank you, Your Honor.

19 THE COURT: Okay. So now tell me about what you all  
20 talked about in terms of trials. I asked you to talk to each  
21 other about how things might look at a trial -- you gave me  
22 some ideas last time -- and how we would -- how we would do  
23 it, whether we should schedule it now or should wait. So who  
24 wants to start off on that -- the Plaintiffs or the  
25 Defendants?

1 MR. WOLFF: I think the Plaintiffs will take a stab  
2 at this one, Your Honor. This is Nelson Wolff. Following the  
3 last conference that we had, I reached out to defense counsel  
4 on July 10 with a proposal, to which they responded 12 days  
5 ago, and we concluded our discussion just last week or maybe  
6 it was yesterday.

7 In any case, Your Honor, to be brief, Plaintiff  
8 proposed that out of the 16 Plaintiffs that have been worked  
9 up from a medical standpoint that we would propose two  
10 separate trials of groups of eight Plaintiffs in order to  
11 determine the common questions of law and fact in a way that  
12 would be efficient in the way of time and costs but also to  
13 provide the Court and the parties with a broader sampling of  
14 verdict values to enable mass disposition and valuation of the  
15 cases. Defendants' response was that they only wanted to try  
16 one Plaintiff in the first trial. That's where we stand.  
17 There was no need to have a further discussion unless we could  
18 reach an agreement on the numbers, and so we wanted to advise  
19 you of that status.

20 THE COURT: Okay. And if it's one Defendant, you all  
21 think somewhere between a month and two months?

22 MS. RENFROE: Your Honor, this is Tracie Renfro for  
23 the defense. If you are prepared to hear from us, I'm --  
24 I'm -- I would like to address --

25 THE COURT: Go ahead. Yeah.

1 MS. RENFROE: -- this issue. Thank you very much.

2 It is true that the Plaintiffs have proposed two  
3 separate trials of eight Plaintiffs each, and it's also true  
4 that the defense has proposed as -- as the first trial a  
5 single-Plaintiff case, a single-Plaintiff trial. However, we  
6 really have not had any meaningful meet and confer on this  
7 issue. We've simply exchanged emails, and I think that there  
8 is some value in at least taking another few weeks to discuss  
9 it to see if we could bridge our differences. I -- I -- we  
10 feel very strongly about the importance of a single-Plaintiff  
11 trial. I'm sure the Plaintiffs feel strongly about that it  
12 ought to be eight Plaintiffs, but there is room for  
13 compromise, I would hope, and what we -- I think the common  
14 objective that we both have -- we may not have a lot in  
15 common, but I think we both are interested in -- both sides  
16 are interested in a trial outcome that can inform all the  
17 parties in the most meaningful way to try and set the rest of  
18 the docket up for -- for resolution, and that's what we're  
19 striving to have.

20 The second consideration that's of paramount  
21 importance is the length of the trial. We are very concerned  
22 because while there may be some issues in common, there are  
23 more issues that are unique to each of these Plaintiffs, and  
24 the nature of the allegations is such that we have to  
25 literally look at each particular Plaintiff's lifetime, both

1 of exposure and causation and their ability to -- what they've  
2 been able to do in terms of education and employment, and so  
3 you're talking -- you're not talking about a one-shot instance  
4 about a given Plaintiff's history. You're talking about  
5 looking at each of their lifetimes of both exposure,  
6 causation, and to the extent there's harm or damage, and when  
7 you talk about doing that for more than one Plaintiff, when  
8 we've already got between the Plaintiffs and the defense over  
9 20 experts, dozens of fact witnesses likely to be called,  
10 you're talking about a very, very extensive, lengthy trial,  
11 not to mention the risk of confusion by the jury.

12 So there are a number of issues. This is very  
13 complicated, and I respectfully suggest that we at least take  
14 the next few weeks to have some voice-to-voice,  
15 lawyer-to-lawyer engagement to see if we can bridge the  
16 difference between their proposal and our proposal, and then,  
17 hopefully, we could at least narrow our differences and then  
18 submit briefs to the Court. That's the proposal from the  
19 defense.

20 MR. WOLFF: May I respond to that, Your Honor?

21 THE COURT: Yes, Mr. Wolff.

22 MR. WOLFF: So the communications that I had were  
23 addressed to all defense counsel, and the one who took the  
24 lead on that was Mr. Drake. At no point in time did  
25 Ms. Renfroe weigh in or offer any of these suggestions during



1 that time, which spanned a period of two weeks. This is the  
2 very first time that any Defendants are suggesting that there  
3 is a willingness to consider a multiple number of Plaintiffs  
4 in a trial. It was a very dismissive email that we received  
5 yesterday morning that said Defendants' position is that the  
6 first trial should involve only one Plaintiff, and that's it.  
7 I don't think that there's genuine interest in moving forward  
8 on this. If there was, then something really should have been  
9 done over the period of the last two plus weeks that we've  
10 been having these discussions.

11 But as to the substantive issue that Ms. Renfroe  
12 raises, these have all been discussed with Defendant. Yes,  
13 it's been done by email, but there was no indication that  
14 owned communications would have been any more productive given  
15 the definitive final response of only wanting to do one  
16 Plaintiff at a time, but we did discuss balancing the risk of  
17 confusion, which could be addressed with appropriate  
18 limitations and appropriate jury instructions, but there's  
19 confusion just in one single case if you look at it from any  
20 perspective, particularly Defendants'. There are complicated  
21 environmental and health care issues here, but presenting  
22 multiple Plaintiffs who have the same types of issues in their  
23 cases doesn't necessarily add significantly to any of that  
24 inherent confusion. That's why both sides have lots of  
25 experts to help clarify and make very clear to the jury what

1 these issues are.

2 Adding additional Plaintiffs -- while it will add  
3 some time, certainly, it is less time than talking about doing  
4 serial cases of individual or smaller groups of Plaintiffs as  
5 the Defendant has suggested because the common issues of both  
6 law and fact for all of these Plaintiffs predominate the  
7 so-called unique issues, which really are just matters of the  
8 varying degrees of damages sustained by each of the  
9 Plaintiffs.

10 In our rough estimate as to a trial for the eight  
11 Plaintiffs that we propose, not yet selected, but eight out of  
12 the 16, we believe that with appropriate time constraints and  
13 economy of scale that that could be presented within a period  
14 of two or three months. Yes, that is longer than it would be  
15 with one, but if we're talking about doing 12 trials or even  
16 six trials, four trials, or whatever -- take your number --  
17 it's still going to conserve judicial resources and costs to  
18 do a group of eight.

19 MS. RENFROE: Your Honor, if I may respond. Tracie  
20 Renfroe.

21 THE COURT: Go ahead.

22 MS. RENFROE: Thank you very much. I strongly  
23 disagree with Mr. Wolff that there -- that the common issues  
24 predominate over the individual issues, and this is exactly  
25 why, number one, we really do need to have some lawyer

1 engagement and, number two, if we can't reach agreement we  
2 need to brief the issues to the Court. I think everybody is  
3 interested in getting a trial structure that will result in  
4 a -- a verdict that everyone has confidence in and that will  
5 be a meaningful indicator of the value of these cases. I can  
6 assure you that trying eight Plaintiffs with this many  
7 experts, this many fact witnesses over -- and each one of  
8 these Plaintiff's lifetime -- I don't think a two- to  
9 three-month estimate is accurate, and I think we ought to  
10 address that in the briefing to the Court if we get -- if  
11 we're not able to reach agreement on this.

12 Let me also add we've heard nothing from Mr. Wolff  
13 but a "take it or leave it" position. I don't believe that  
14 really is their position, but we've not had the engagement I  
15 think we should. For better or worse, right or wrong, the  
16 fact is I think -- and I'm prepared to take this on personally  
17 with Mr. Wolff -- that if we can have some discussion, I think  
18 we can at least find some common ground on some of the aspects  
19 about selecting a trial, whether it's the number of Plaintiffs  
20 or how they are to be selected or the issues to be tried, but  
21 the exchange of emails between the parties -- while that's a  
22 start, we need to be doing more, and that's my suggestion.

23 THE COURT: So, Ms. Renfroe, under your suggestion,  
24 when would you be prepared to do this, and when would you be  
25 filing these briefs if you aren't in agreement?

1 MS. RENFROE: Well, I'm prepared to continue  
2 discussions with Mr. Wolff this week. I've got depositions  
3 and hearings in another case. I would like to have the  
4 benefit of next week to have discussions with him or anybody  
5 on his team, and if at the end of next week or the week after  
6 that -- let's say -- let's -- I mean I think we ought to at  
7 least give this a meaningful shot and take the first week or  
8 two of August. If we can't close our differences by then, I  
9 would hope we could at least narrow them and then be prepared  
10 to submit briefing to the Court either by the end of August or  
11 early September, bearing in mind that we're also wrapping  
12 up -- we're working on our summary judgment briefing, but that  
13 would be my suggestion.

14 MR. SCHLICHTER: Your Honor, this is Jerry  
15 Schlichter. Could I add a point?

16 THE COURT: Yes. Go ahead.

17 MR. SCHLICHTER: This issue of multiple trials --  
18 yeah, this issue of multiple trials versus single [audio  
19 cutout] is a very repeated issue that comes up as to our  
20 cases. Going back to the first mass tort case --

21 THE COURT: Mr. Schlichter, Mr. Schlichter, I'm  
22 having trouble hearing you. You seem to be cutting out a  
23 little bit --

24 MR. SCHLICHTER: I'm sorry. Okay. I'm sorry. Can  
25 you hear me now?

1 THE COURT: -- so it's a problem. Yeah, that's much  
2 better.

3 MR. SCHLICHTER: Yeah. Going back to the first mass  
4 tort case in St. Louis many years ago, which was the Missouri  
5 Times Beach dioxin case that Lewis Rice and my office at the  
6 time were involved in, this was looked at in-depth with --  
7 this was in state court, but Judge Sanders at the time looked  
8 all over the country at mass tort cases. The same arguments  
9 were made -- one at a time, which means forever, and the  
10 parties don't get a cross-section look at a variety of cases  
11 for purposes of disposition in the long term because you can  
12 get, obviously, aberrant verdicts. You get certain facts in  
13 one case that are not repeated in another, certain medical  
14 conditions, and that's why Judge Sanders, in the first mass  
15 tort case in St. Louis, decided to have a multiple-plaintiff  
16 trial in that case as well. That case involved 400 venire  
17 people who were called in for the first trial and settled at  
18 the courthouse during that process with Lewis Rice on the  
19 other side.

20 So in terms of the idea that one case is going to  
21 give a look at what these cases might be worth -- to the  
22 extent that's a factor, apart from the efficiencies of not  
23 having the same experts come in over and over again on air  
24 modeling and all the other generic issues that are the same,  
25 beyond that, the parties end up with one trial and don't have

1 a look the same way they would if we had eight. So I think  
2 that is a very important consideration for the Court's economy  
3 and efficiency in trying to resolve this litigation overall.

4 THE COURT: Okay.

5 MS. RENFROE: Your Honor, if I may respond --

6 THE COURT: No. That's okay. I've heard enough on  
7 this. What I want you to do is what Ms. Renfroe proposed,  
8 that you all discuss what you're doing, talk and see if you  
9 can reach any compromise on this, and if not, I would like you  
10 all on September 15th to file simultaneous briefs, no more  
11 than 10 pages. We don't need any exhibits because I'm not --  
12 whatever you said to each other in your meetings doesn't  
13 matter to me at that point; I just want to hear what your  
14 final positions are, or, you know, I want to hear what you're  
15 saying to me at that point. So just give me 10 pages each,  
16 simultaneous, September 15th, on your positions of trial, and  
17 then I will look at that and give you a ruling and figure out  
18 what we're going to do.

19 And I -- you know, one of the issues is I can't -- I  
20 imagine that it will take -- I suspect scheduling may be a  
21 difficult issue for setting this trial, but I -- you know, we  
22 need to start working on how this is going to look, so -- and  
23 so I -- we'll -- you know, that's what I'd like you to do. So  
24 let's do that.

25 And then I guess, you know, everything -- I mean it's

1 not surprising; I mean, as we all know, when you get closer to  
2 the end of these deadlines, everybody starts fighting about  
3 the stuff that -- you know, "Oh, my goodness, we've got to get  
4 this done," and so you all have been very cooperative lately,  
5 and I really appreciate it, and I do understand why, as we're  
6 getting close to the end, you're now fighting about  
7 everything, but maybe you can work something out on that and  
8 some other things.

9 Now, on mediation, have you all -- I assume -- I mean  
10 has there been any progress or even a structure set up or a  
11 discussion about whether there's anything to be done or you're  
12 just going to file the summary judgment motions and  
13 everybody's going to dig in their heels, and, you know, we'll  
14 worry about mediation maybe later, before trial. Any  
15 conversations or anything you think you can report to me about  
16 getting in touch with Mr. Perry or -- I don't know what  
17 happened in the *Collins* mediation or if it even went forward.  
18 I had an idea maybe it didn't happen. Let's start with that.  
19 What's your report on what happened at the *Collins* mediation?  
20 I mean just the results from the --

21 MR. BAYMAN: Your Honor --

22 THE COURT: Yeah. Go ahead.

23 MR. BAYMAN: Excuse me, Your Honor. Andrew Bayman  
24 for the Defendants. Unfortunately, due to the spike in COVID,  
25 the *Collins* mediation has been postponed. The parties are

1 attempting to schedule something in the middle of September,  
2 location to be determined given quarantine rules, and as I may  
3 have told the Court, Mr. Juneau is in his eighties and is high  
4 risk, and so it had to be postponed, but we are working with  
5 the Plaintiffs' lawyers on getting it rescheduled.

6 THE COURT: And so what -- what -- have you had any  
7 discussions with the Plaintiffs' lawyers in this case about  
8 trying to set up another mediation, either with John Perry or  
9 with someone else?

10 MR. BAYMAN: We have, Your Honor, and the Defendants  
11 are open to having a further dialogue with Mediator Perry and  
12 have indicated that. Mr. Schlichter, as I understand it,  
13 called Mr. Dowd and said he thought the parties were  
14 significantly far apart that he didn't see it worth the time  
15 and expense to do that with Mr. Perry, but the Defendants are  
16 open to further dialogue with the mediator, which was our  
17 suggestion, or without.

18 MR. SCHLICHTER: Your Honor, this is Jerry  
19 Schlichter.

20 THE COURT: Yeah. Go ahead.

21 MR. SCHLICHTER: The prior mediation was the most  
22 expensive mediation I've ever seen. I could give you the  
23 amount if you want to hear it, but it was quite expensive.  
24 Defendants would not appear in St. Louis. The mediator  
25 traveled with another lawyer in his office to New York.



1 THE COURT: I don't -- I don't need all the details.

2 MR. SCHLICHTER: Okay. All right.

3 THE COURT: When you tell me it's the most expensive  
4 you've ever seen, that means enough for me to know that it was  
5 expensive, and there's --

6 MR. SCHLICHTER: Okay. So because that process ended  
7 with no prospect of settlement and I was -- I've been involved  
8 in the process, in the mediation part of this case from the  
9 get-go. After your order or your suggestion that we do  
10 another round, I just called -- rather than go through the  
11 mediator, I just called their -- King & Spalding's settlement  
12 lawyer, Mr. Hooper, directly, and I said, "Let's" -- well, I  
13 don't want to go into what I said. I did that because I  
14 wanted to short-circuit going through a process again that  
15 would be a waste of time and money. And we had direct  
16 conversations. After that communication, it was clear to me,  
17 to us, that this process is not changed in any way. There was  
18 no change in the positions, and the prospect of anything  
19 happening further at this point in time was nil. So that's --  
20 that was from the direct communication with the Defendants'  
21 settlement attorney, and we see at no point -- at this point,  
22 we see nothing further that's going to be productive by going  
23 through a process now. Obviously, we have been open to  
24 settlement in this case from the beginning, but if there were  
25 something that were prospect --

1 THE COURT: Can you hold on? No. Go ahead. Sorry.  
2 You -- yeah.

3 MR. SCHLICHTER: If there were a prospect of it, of  
4 course, we'd be interested, Your Honor. [audio cutout]  
5 There's no prospect of that at this point, and unless there's  
6 a very different posture, it would be a waste of time beyond  
7 these direct communications we've had.

8 THE COURT: Okay. Well, I think that's all I need to  
9 hear at this time about mediation. I'm glad to know that  
10 there is some -- some talk that -- you know, at least one side  
11 is saying, "Well, we'll be happy to talk," but -- but, you  
12 know, let's see what happens in the *Collins* mediation, see if  
13 you all can be informed by that, and I -- you know, we'll --  
14 we'll move forward. We've got -- we know where we're headed  
15 now.

16 So the -- hold on just a second. Let me look at my  
17 notes.

18 All right. So here's -- here's what I have to  
19 discuss with you. I think in terms of follow-up from what  
20 we've said here today, I will talk to you all next week, on  
21 Tuesday, August the 4th, at noon, in another conference for  
22 the purpose of talking about these additional fact  
23 depositions, and you'll file something by August 3rd, end of  
24 the day, perhaps file it at midnight, but anyhow, that tells  
25 me what you've agreed on or what you haven't agreed on or what

1 we're fighting about so I have some idea.

2 And then on the issue of the trial, I want you to  
3 continue meeting and conferring and then on the 15th file  
4 simultaneous briefs of not more than 10 pages each, with no  
5 further briefing, to just tell me what your positions are on  
6 how the trial should look, and in terms of number of  
7 Plaintiffs, I think that's the big issue.

8 And, you know, I will just tell you that in talking  
9 to judges around the country, how well this works is just all  
10 over the place, and I think everybody agrees that there's not  
11 a perfect solution, and so I just -- you know, I've -- you  
12 know, I don't know. I think I'm not sure how -- I'm not sure  
13 what's right on this. I don't have any preformed opinions. I  
14 hate the thought of saying, okay, we'll just do them one at a  
15 time because I don't know how many we'd get through before  
16 there would be movement from anybody, but I do think that, you  
17 know, I understand the thinking that goes into them, and I  
18 hope that you all can reach some agreement or narrow it down,  
19 but if you can't, then, you know, tell me what you want and  
20 we'll do that. I'm not going to order you to mediation or  
21 anything at this time, not when you're telling me how far  
22 apart you are.

23 But the issue hanging out from last -- our last  
24 settlement or, I mean, our last status conference had to do  
25 with the production of billing records from the -- for the

1 expert witnesses in retention agreements, and I looked at the  
2 briefs that you all filed on that, and it appears to me that  
3 there was a -- there is a difference of opinion on what you  
4 agreed to. No one can -- I mean I don't believe there's a  
5 definitive answer on who's right and who's wrong about what  
6 your agreement was, and so I am falling back on common sense  
7 and the way this works. Everyone is entitled to cross-examine  
8 each other's expert witnesses at trial on their compensation  
9 as a matter of showing bias of the experts, and I don't -- it  
10 doesn't do anybody any good, and it's very frustrating to sit  
11 in a trial; it's frustrating for jurors to have people try to  
12 do that and have the expert say, "Oh, I don't know. Somebody  
13 else in my office handles that. I have no idea."

14 This is information both sides should be armed with  
15 when we get to trial. So I am going to require it to be  
16 produced, and I'm going to -- since we've had so many  
17 conversations about it, I'm not going to require anybody to  
18 file formal requests or briefs or anything else. We've talked  
19 about this. It's discoverable. It's admissible. How much  
20 are they making?

21 Now, I want you all to decide how that's going to be  
22 because whatever each side does is going to be the same. So  
23 we're going to either -- is it going to be produced for each  
24 expert we want their retention agreements, if there's more  
25 than one, more than one, all of them, and we want every bill

1 they ever sent itemized by hour, rate, person, et cetera.

2 That's one way to do it. Another way to do it is to have you  
3 all agree on something more summary form that would be binding  
4 on the experts. In other words, I want something -- probably  
5 what you'll need to have -- I don't -- you might agree to  
6 something different, but is each expert who's actually  
7 testifying to sign an affidavit close to trial saying, "This  
8 is what I've charged" because if you just turn over the  
9 records, the guy on the stand will say, "I don't know. That's  
10 up to somebody else. I didn't have anything to do with it."

11 I would like you all to be able to show bias and not  
12 have anybody wiggle out of it, and maybe once you do this,  
13 you'll decide, you know, you don't really need to do that or  
14 spend a whole lot of time on it at trial.

15 So I want you all to -- so my ruling is you're going  
16 to have to produce evidence of what the compensation was that  
17 is in a form that can be used at trial to impeach an expert  
18 witness, and so that means something the witness himself or  
19 herself will not try to disavow at the time of trial, and I  
20 want you all to meet and confer and decide what that is.

21 If you can't reach agreement, then probably what I  
22 would require -- I'm not positive, but most likely -- would be  
23 the retention agreements and all bills plus an affidavit or  
24 declaration from the expert, signed under penalty of perjury,  
25 that this is what the expert has charged for the work in the

1 case.

2 But we don't -- we're not going to do that now.  
3 We're going to do that when we get closer to trial. You all  
4 just need to have that in your mind and understand that that  
5 will be what's required, but -- and I'm not going to set a  
6 schedule at this point for when you're going to talk to each  
7 other, et cetera, but that is what's going to be required, and  
8 I hope that when we get close to trial, you all will make a  
9 decision and work with each other and agree on how you'll do  
10 it, but if you don't agree, then I've told you what I would  
11 rule. So that's the -- that's that issue.

12 What else is there that we need to discuss at this  
13 time?

14 I will talk to you next week about the fact  
15 depositions, fact witness depositions that you all have been  
16 discussing. So what I want to talk about is also everything  
17 that's left. Any agreements you have, I'd like to know the  
18 status so we won't have further fights. You know, have you  
19 agreed to something in Peru? Have you not? Whoever is taking  
20 it. I don't care if it's the things that Plaintiff wants or  
21 the things the Defendant wants. I want to resolve any of that  
22 stuff. So I want you to meet and confer on everything that's  
23 left that you think still needs to be done in terms of  
24 depositions before the close of discovery.

25 Okay? So that's what we'll do. Anything further

1 from you all? From the Plaintiffs, anything further?

2 MR. WOLFF: No, Your Honor. Thank you.

3 THE COURT: From the Defendants, anything further?

4 MS. RENFROE: No, Your Honor. Thank you very much.

5 MR. BERRA: Thank you, Your Honor.

6 THE COURT: Okay. Thank you all, and we'll -- I will  
7 talk to you next week, and I don't have to have all of you on  
8 the line. I'm happy if you just designate a couple of people.  
9 As long as I have one lawyer for each side, I'm happy, okay,  
10 but whoever wants to participate may do so.

11 All right. That -- that concludes this status  
12 hearing, and I'm going to end the call. Thank you.

13 (Proceedings concluded at 10:51 a.m.)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE

I, Gayle D. Madden, Registered Diplomate Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 31 inclusive.

Dated at St. Louis, Missouri, this 3rd day of August, 2020.

*/s/ Gayle D. Madden*

---

GAYLE D. MADDEN, CSR, RDR, CRR

Official Court Reporter